UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE FACEBOOK, INC. AND MARK ZUCKERBERG, PLAINTIFFS,	C-07-01389 JW
VS.	SAN JOSE, CALIFORNIA
CONNECTU, INC. (FORMERLY KNOWN AS CONNECTU, LLC), PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, AND WAYNE CHANG,	AUGUST 6, 2008
DEFENDANT.	PAGES 1-73

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES WARE
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: ORRICK, HERRINGTON & SUTCLIFFE
BY: I. NEEL CHATTERJEE,
MONTE M.F. COOPER, AND
YVONNE GREET
1000 MARSH ROAD
MENLO PARK, CALIFORNIA 94025

APPEARANCES CONTINUED ON NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

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APPEARANCES (CONTINUED)

FOR THE DEFENDANT: BOIES, SCHILLER & FLEXNER, LLP
BY: D. MICHAEL UNDERHILL
5301 WISCONSIN AVENUE, N.W.
WASHINGTON, D.C. 20015

FOR INTERVENOR: O'SHEA PARTNERS, LLP
BY: SEAN F. O'SHEA AND
MARK A. WEISSMAN
90 PARK AVENUE, 20TH FLOOR
NEW YORK, NEW YORK 10016

16:49:33 THERE'S NO COMPLAINT IN INTERVENTION THAT DOES IT. IT SIMPLY SEEMS TO BE AN ORDER PERMITTING THAT INTERVENTION WITH THE IDEA THAT IF THE CASE RETURNS TO A LITIGATED STATUS, THEN I NEED TO SORT OUT WHETHER THEY ARE INTERVENING AS PLAINTIFFS OR DEFENDANTS AND WHO ARE THE PARTIES AGAINST WHOM THEY WOULD BE PURSUING THEIR CLAIMS.

16:49:56 LET ME PAUSE WITH THOSE INTRODUCTORY COMMENTS AND INVITE MR. O'SHEA OR OTHERS TO COMMENT ON THE COURT'S INTENDED DECISION.

16:50:06 MR. O'SHEA: THANK YOU, YOUR HONOR.

16:50:07 FIRST OF ALL, JUDGE, THANK YOU FOR HEARING US ON SHORT NOTICE. WE APPRECIATE IT AND WE ARE -- YOU'RE CORRECT THAT WE'RE NEW TO THE FRAY HERE.

16:50:15 THIS INTERVENTION MOTION, YOUR HONOR, IS STRAIGHTFORWARD. WE'RE HERE ON BEHALF OF ACTUALLY THREE PERSONS SEEKING INTERVENTION. THE APPLICANT INTERVENORS ARE TYLER AND CAMERON WINKLEVOSS, WHO ARE BROTHERS, AND DIVYA NARENDRA, AS YOUR HONOR IS AWARE, THE INDIVIDUALS WHO SIGNED THE TERM SHEET WHICH YOUR HONOR HELD ENFORCEABLE AND THAT IS GOING TO BE THE SUBJECT OF AN APPEAL.

16:50:38 ONE OF THE TERMS OF THAT TERM SHEET IS THAT FACEBOOK GETS OWNERSHIP OF CONNECTU STOCK.

16:50:44 UNTIL VERY RECENTLY, JUDGE, MY CLIENTS BELIEVED, AND HAD A SOUND BASIS FOR THAT BELIEF, THEY BELIEVED THAT THEIR RIGHTS ON APPEAL COULD BE ADEQUATELY PROTECTED BY CONNECTU SINCE YOUR HONOR HAD APPOINTED A SPECIAL MASTER, MR. FISHER, WHO IS HERE TODAY, TO MAINTAIN THE STATUS QUO, AND WE WERE AT THAT POINT HAPPY WITH THAT, WITH THAT STATE OF EVENTS.

16:51:05 SINCE THEN, YOUR HONOR, FACEBOOK HAS BEEN ASSERTING THAT IT WILL TAKE CONTROL OF CONNECTU'S LITIGATIONS ONCE IT TAKES CONTROL OF CONNECTU'S STOCK, AND WE'VE BECOME VERY CONCERNED THAT WHILE CONNECTU'S APPEAL IS PENDING IN THE NINTH CIRCUIT, THAT FACEBOOK WILL TRY TO ASSUME CONTROL OF CONNECTU AND ABANDON OR OTHERWISE HAMPER OR IMPAIR THE APPEAL.

16:51:27 I UNDERSTAND FROM MR. UNDERHILL, WHO REPRESENTS CONNECTU, THAT HE HAS ASKED FOR ASSURANCES FROM MR. CHATTERJEE, FACEBOOK'S COUNSEL, THAT MY CLIENTS' RIGHTS WILL NOT BE -- AND CONNECTU'S RIGHTS WILL NOT BE IMPAIRED ON APPEAL, THAT THE APPEAL WILL BE ALLOWED TO GO FORWARD.

16:51:43 BUT FACEBOOK HAS BEEN UNWILLING TO AGREE TO GIVE THOSE ASSURANCES.

16:51:46 AND, INDEED, IN THEIR OPPOSITION TO THE

STAY MOTION, JUDGE, THEY'VE NOW SAID THAT THE APPEAL IS, IN FACT, MOOT. THEY'VE TAKEN THAT POSITION.

SO THAT'S WHY WE'RE HERE TODAY, JUDGE. WE NEED TO INTERVENE. WE NEEDED TO INTERVENE ON SHORT NOTICE SINCE MY CLIENTS NEED REALLY TO PRESERVE THEIR RIGHTS ON APPEAL.

AND TO ADDRESS YOUR HONOR'S CONCERNS ABOUT TRYING TO REOPEN OR RELITIGATE THE UNDERLYING MATTER, THAT'S NOT OUR PURPOSE BEFORE THE COURT HERE TODAY.

WHAT OUR PURPOSE IS, IS TO GET THE COMPLAINT BEFORE THE COURT SO THAT WE CAN PRESERVE OUR RIGHT TO APPEAL, AND THAT'S WHAT WE'D LIKE TO DO.

INTERVENTION IS APPROPRIATE, YOUR HONOR, AND AS YOU KNOW, THE STANDARD FOR, FOR APPLICATION OF INTERVENTION IS VERY LIBERAL. OUR -- IT'S APPROPRIATE HERE UNDER BOTH SECTIONS, SUBSECTIONS OF RULE 24.

FIRST OF ALL, FOR AN INTERVENTION AS A RIGHT, WE MEET ALL FOUR PRONGS OF THE TEST: ONE, WE'RE TIMELY; SECOND, WE HAVE A SIGNIFICANTLY PROTECTABLE INTEREST; THIRD, THE DISPOSITION OF THIS ACTION, AS A PRACTICAL MATTER, COULD IMPAIR

17:21:01 WHAT GOES ON NOW IS THERE'S A CHECK THAT'S WRITTEN EVERY MONTH FOR THE RENTAL OF THE SERVER. THAT'S IT. WE'LL WRITE THE CHECK. HE DOESN'T EVEN HAVE TO WORRY ABOUT THAT.

17:21:10 WE WILL NOT MAKE A SINGLE OPERATIONAL CHANGE IN THE SLIGHTEST. YOU KNOW, WE'LL PUT IT OUT OF OUR HANDS.

17:21:18 IN FACT, YOUR HONOR, WE WOULD EVEN BE WILLING TO LET CONNECTU OPERATE THE BUSINESS.

17:21:22 NOW, THAT'S VERY DISTINCT, BY THE WAY, FROM HAVING THE COMPANY. WE DON'T AGREE THAT THEY CAN HAVE --

17:21:26 THE COURT: FACEBOOK.

17:21:27 MR. UNDERHILL: I'M SORRY?

17:21:27 THE COURT: YOU SAID CONNECTU.

17:21:28 MR. UNDERHILL: I'M SORRY.

17:21:29 THE COURT: YOU MEAN FACEBOOK.

17:21:31 MR. UNDERHILL: MY MISTAKE. I MEANT TO SAY FACEBOOK.

17:21:35 OBVIOUSLY WE WILL NOT VOLUNTARILY PERMIT THEM TO TAKE OVER OUR APPEAL BECAUSE WE DON'T THINK THEY WOULD DO AS GOOD A JOB AS WE WILL.

17:21:39 WE'RE NOT GOING TO LET THEM TAKE OVER THE MALPRACTICE CASE.

17:21:41 BUT IF THEY REALLY JUST WANT TO OPERATE

17:21:42 THIS THING, IF THEY WANT TO WRITE THE CHECK TO THE
17:21:45 SERVER, YOU KNOW, ONCE A MONTH, IF THEY WANT TO
17:21:49 REWRITE THE CODE, IF THEY WANT TO START
17:21:51 ADVERTISING, THEY CAN DO WHATEVER THEY WANT WITH
17:21:53 IT, IT'S THEIRS, AS LONG AS WE CAN KEEP OWNERSHIP
17:21:56 OF CONNECTU SUFFICIENT TO SATISFY AN APPEAL.
17:21:59 NOW, WHAT WE HEARD IN THE PRIOR MOTION IS
17:22:03 ONE MORE GAMUT TO TRY TO DENY US AN APPEAL.
17:22:07 AS MUCH AS MR. CHATTERJEE EXPRESSES
17:22:10 CONFIDENCE IN THE COURT'S OPINION, HE SURE IS
17:22:13 TRYING AWFULLY HARD TO KEEP THE NINTH CIRCUIT FROM
17:22:16 EVER HEARING THESE ISSUES.
17:22:17 THE COURT: LET ME ASK THIS, COUNSEL.
17:22:19 MR. UNDERHILL: YES, YOUR HONOR.
17:22:20 THE COURT: IF I GO ALONG WITH THIS
17:22:24 PROPOSAL -- I'M NOT SAYING I WILL -- AND THERE IS
17:22:29 AN APPEAL THAT IS PURSUED INDEPENDENT OF CONNECTU,
17:22:35 WHO PAYS FOR THE COST OF THE APPEAL?
17:22:38 MR. UNDERHILL: WE'LL TAKE CARE OF THAT,
17:22:40 YOUR HONOR. NO PROBLEM.
17:22:41 THE COURT: WHO'S "WE"?
17:22:42 MR. UNDERHILL: IT WON'T BE CONNECTU.
17:22:45 I'LL WORK IT OUT WITH THE SHAREHOLDERS.
17:22:47 THE COURT: AH. I SEE.
17:22:48 AND SO YOU'RE REQUESTING, ESSENTIALLY, TO

THE ENFORCEMENT MOTION, FRANKLY, YOUR HONOR, IT'S SOMEWHAT ABSURD TO ARGUE THAT.

WE WANT THE VALUE OF WHAT WE PURCHASED, AND STAYING THE PROCEEDINGS IS, IS, IS TANTAMOUNT TO NOT RECOGNIZING THE SETTLEMENT AGREEMENT.

THERE'S A PUBLIC INTEREST HERE IN RECOGNIZING THESE AGREEMENTS THAT GETS IMPLICATED. YOUR HONOR RECITED THAT YOURSELF AT THE JUDGMENT HEARING.

THE ONE THING -- THE ONE OTHER POINT I WANT TO MAKE IS, CANDIDLY, WE HAVE A BIG ISSUE WITH THEM HAVING ANY DECISION MAKING OVER CONNECTU.

AND I'M NOT TALKING ABOUT THE LAWYERS. I'M TALKING ABOUT THE WINKLEVOSS BROTHERS AND DIVYA NARENDRA AND HOWARD WINKLEVOSS.

THEY INITIATED THE LITIGATION WITHOUT EVER CONSULTING ANYBODY AFTER THE JUDGMENT WAS ENTERED. THEY DON'T LIKE OUR COMPANY.

SO IF THINGS AREN'T GOING WELL IN THE NINTH CIRCUIT, THEY CAN DO WHATEVER THEY WANT.

THEY HAVE NOT PUT THE STOCK INTO GEORGE FISHER'S HANDS PER YOUR HONOR'S ORDER. THAT WAS DUE MONDAY, AND AT 2:15, GIVE OR TAKE A FEW MINUTES, ON MONDAY, AFTER WE HAD PUT ALL OF OUR CONSIDERATION IN, THAT SUBSTANTIAL AMOUNT OF MONEY

17:30:31 AND THE SUBSTANTIAL AMOUNT OF SHARES, THEY NOTIFIED US THAT THEY WERE GOING TO MAKE THE DECISION NOT TO SUBMIT IT TO HIM IN VIOLATION OF YOUR HONOR'S ORDER.

17:30:39 WHAT CONFIDENCE COULD WE POSSIBLY HAVE THAT THEY ARE GOING TO PROTECT THE VALUE OF THAT ASSET? IT'S SIMPLY NOT THERE. WE HAVE ZERO CONFIDENCE IN THEM.

17:30:48 THE COURT: WELL, HERE'S THE DILEMMA THAT I SEE. I CONTINUE TO BELIEVE THAT THE JUDGMENT WAS PROPERLY ENTERED HERE.

17:30:54 BUT I ALSO BELIEVE THAT ANY JUDGMENT IS APPEALABLE TO A HIGHER COURT, ANY JUDGMENT OF THIS COURT.

17:31:05 AND I'M IN A CIRCUMSTANCE WHERE IT'S NOT A MONEY JUDGMENT WHERE A BOND WOULD BE SUFFICIENT, SO THAT I'M TRYING TO WALK MY WAY THROUGH A PROCESS BY WHICH, EVEN IF I'M DISPOSED TO DENY THE STAY OF EXECUTION, I WON'T DENY THE RIGHT TO APPEAL.

17:31:31 SO IF I UNDERSTAND THAT THE EXECUTION COULD AMOUNT TO THE PLAINTIFF HERE TAKING THE UNUSUAL STEP OF SAYING, "WELL, NOW AS THE SHAREHOLDER, I TERMINATE THE APPEAL," THE EXECUTION WOULD BE, IN EFFECT, A PLACING OF THE RIGHT OF APPEAL, BUT DENYING THE RIGHT TO APPEAL. IT WOULD

TERMINATE BY THE EXECUTION.

I'VE NEVER FACED THAT SITUATION BEFORE, AND SO IT'S UNCHARTED WATER FOR ME.

AND SO THAT'S WHAT I NEED HELP WITH, BECAUSE UNLESS YOU CONVINCE ME THAT THERE SHOULD BE NO RIGHT TO APPEAL, I HAVE TO PUT THE OPPOSING PARTY TO MY JUDGMENT IN A POSITION SO THEY CAN CHALLENGE MY JUDGMENT.

MR. CHATTERJEE: SO, YOUR HONOR, I THINK WHAT YOU'RE IDENTIFYING IS, IS THE CONFLICT THAT WE HAVE HERE OF HARDSHIPS.

WE PURCHASED AN ASSET. WE WANT TO GET VALUE FOR THE ASSET.

AND WE ALSO SOUGHT PEACE, AND THERE'S A LOT OF HARDSHIP IN NOT ACKNOWLEDGING THAT PEACE.

THEIR PURPORTED HARDSHIP IS ESSENTIALLY THE RISK OF MOOTING AN APPEAL ON BEHALF OF CONNECTU.

IF YOU ALLOW INTERVENTION, YOUR HONOR, CANDIDLY, THAT MAY BECOME A NON-ISSUE DEPENDING ON WHATEVER RIGHTS THE INDIVIDUALS HAVE UPON INTERVENTION, BECAUSE AS YOUR HONOR NOTICED BEFORE, THEY ESSENTIALLY ARE ASSERTING THE SAME SORTS OF CLAIMS OF A THIRD PARTY COMPLAINANT.

NOW, WHEN YOU HAVE THESE TWO COMPETING